PITCHAYKUTTY v. PUBLIC PROSECUTOR

[A.Cr.J. (Rigby J.) July 24, 1961]

[Penang — Criminal Appeal No. 11 of 1961]

Criminal Law and Procedure — Penal Code, s.182 — Sanction under s.139, Criminal Procedure Code (S.S. Cap. 21) — Effect of absence of sanction — Effect of defective sanction — Whether curable under s.448 of the Code.

The appellant was convicted of an offence under section 182 of the Penal Code in that he made a false complaint to a Magistrate on July 7, 1960 that he had been assaulted by three male Indians on June 5, 1960. In signing the sanction required under section 139 of the Criminal Procedure Code for a prosecution under section 182 of the Penal Code, the Deputy Public Prosecutor through a mistake, stated the date of offence as June 5, 1960 instead of July 7, 1960. It was argued on appeal that the trial of the appellant on a charge under section 182 of the Penal Code was a nullity as no sanction to prosecute had been obtained as required under section 139 of the Criminal Procedure Code in respect of the offence committed on July 7, 1960.

Held: (1) for an offence under section 182 of the Penal Code the absence of a sanction under section 139 of the Criminal Procedure Code renders all proceedings before a Magistrate *null* and *void* even if the want of sanction occasions no miscarriage of justice. *Hassan bin Isahak* v. *Public Prosecutor* (1) discussed and applied;

(2) the sanction was defective by reason of a wrong date having been inserted. This was an error and no more and was therefore curable under section 448(a) of the Criminal Procedure Code the defect in no way occasioning a failure of justice.

Cases referred to:—

(1) *Hassan bin Isahak* v. *Public Prosecutor* [1948-49] M.L.J. Supp. 179.

(2) *Muthu Moopan & Anor.* v. *Rex* I.L.R. 1937 Mad. 664.

(3) *Salleh & Anor.* v. *Rex* 10 S.S.L.R. 27.

(4) *Ng Chuan & Anor.* v. *Rex* [1948] M.L.J. 185.

CRIMINAL APPEAL.

Triptipal Singh for the appellant.

Raja Redzuan bin Tengku Yaacob (Deputy Public Prosecutor) for the respondent.

Rigby J.: The appellant in this case was convicted by the learned Magistrate of an offence under section 182 of the Penal Code, in that he made a complaint on the 7th July 1960, to the Magistrate, Enche' Eusoff bin Chin, to the effect that on the 5th June, 1960, he had been assaulted by three male Indians, two of whom had broken the lock of his cupboard and taken away money amounting to $900, intending thereby to cause such public servant to do something, to wit, to cause investigation into the said information, which such public servant ought not to do, if the true state of facts was known by him. Upon conviction the appellant was bound over for a period of six months in his own recognisance in the sum of $100. He now appeals against the conviction.

During the hearing of the appeal Mr. Triptipal Singh, on behalf of the appellant, at the eleventh hour raised the point that the Magistrate had no jurisdiction to entertain the charge at all and that the whole proceedings were null and void by reason of the fact that there was no valid sanction, as required by section 139 of the Criminal Procedure Code, before the Magistrate empowering him to try the appellant upon the offence as charged. Since objections as to jurisdiction can be raised at any stage of the proceedings and it is the duty of the Court, if necessary of its motion, to consider whether jurisdiction has been properly exercised, I adjourned the appeal and directed Mr. Triptipal Singh to serve further grounds of appeal upon the Legal Adviser. The matter now comes before me on resumed hearing. Before dealing with the argument raised by Mr. Triptipal Singh on the issue of jurisdiction, I think it desirable to deal briefly with the facts of the case and with the earlier arguments raised by Mr. Triptipal.

The brief facts of the case were that on the 5th June, 1960, the appellant was assaulted upon his own premises by three Indians, as a result of which he was rendered unconscious and had to be taken to hospital, where he remained for some days. While in the hospital the appellant made a statement to the Police on the 5th June, in the course of which he referred to the incident of the assault and said that the assailants had wished to take money from him amounting to $900. On the 7th July, a little over a month later and after his discharge from hospital, he made a complaint before the Magistrate in the course of which he alleged that the assailants had broken the lock of his cupboard and taken the $900. As a result of his complaint the matter was referred to the Police for investigation and in consequence of that investigation there was every reason to believe that the statement itself was false and that it was made out of rancour arising out, not unnaturally, from the bruta! assault which he had sustained at the hands of these three persons. However, as a result of that false complaint the present charge was preferred against him. Mr. Triptipal Singh, for the appellant, made no complaint as to the findings of fact by the learned Magistrate, but based his grounds of appeal solely upon objections of a somewhat technical nature.

His first ground of appeal was that there was no evidence upon which the Magistrate could find that the accused before him was, in fact, sufficiently identified as the person who had made the complaint as a result of which the charge was brought. The Magistrate before whom the complaint was made was not called as a witness, and the sole witness as to identification was the Tamil interpreter who had interpreted at the time the complaint was made to the Magistrate. In his evidence he stated:—

"The complaint was read over by me and explained to the accused".

Now, whilst it may well be — and I think it would have been — very much more satisfactory if he had gone on to say in his evidence:—

"I now identify the person in the dock as the person who made the complaint",

I am of the opinion that the reference in his evidence to the words: — "explained to the accused" is sufficient *prima facie* evidence of identifying the person in the dock as the person who made the statement before the Magistrate in July, 1960, at the time he was acting as interpreter.

Complaint was also made by Mr. Triptipal Singh that there was no evidence that the complaint made before the Magistrate was, in fact, a sworn complaint. Here, again, it is perfectly true that the interpreter, when giving evidence at the trial of the appellant, has not said in so many words that the appellant was sworn before he made his complaint to the Magistrate. There is, however, reference in the complaint itself in the following words: "The complainant being affirmed states in Tamil". I am satisfied that is sufficient *prima facic* evidence that the complaint made before the learned Magistrate was, in fact, a sworn complaint. It is, however, clear from section 182 of the Criminal Procedure Code that for purposes of this charge the information given to a public servant as a result of which such public servant takes action need not be a sworn complaint.

These were the grounds which Mr. Triptipal Singh first argued before me. I am satisfied that whilst those grounds may give justifiable cause for criticism as to the procedure followed in this case they are insufficient grounds upon which I ought to interfere with the conviction imposed by the learned Magistrate.

I turn now to the somewhat belated contention raised by Mr. Triptipal Singh that there was no valid sanction for the prosecution, as required by section 139 of the Criminal Procedure Code, and that, therefore, the Magistrate had no jurisdiction to entertain these proceedings before him.

Section 139(1) of the Criminal Procedure Code enacts that:—

"No Court shall take cognisance —

(a) of any offence punishable under sections 172 to 188 of the Penal Code, except with the previous sanction of the Public Prosecutor or on the complaint of the public servant concerned or of some public servant to whom he is subordinate".

It is admitted that no complaint was made by the Magistrate concerned. The sanction was given by the then Deputy Public Prosecutor, Mr. Massie, and it reads that it was given for the prosecution of the appellant for an offence under section 182 of the Penal Code alleged to have been committed on the 5th June, 1960. That was, of course, the day on which the appellant was assaulted by the three Indians in his shop, and as the result of which he was admitted to hospital, and, thereafter, he subsequently made the complaint to the Magistrate on 7th July against his assailants. Whilst it is true that on the 5th June he did make a statement to the Police in relation to the assault, in which he stated that the three persons who had assaulted him wanted to take his money amounting to $900, he made no allegation that they did, in fact, do so, and it is quite clear that the statement he then made to the Police could not have constituted any offence on which he could be prosecuted. In his statement made from the Bar, Mr. Massie, the then Deputy Public Prosecutor, made it clear that the offence for which he intended to give sanction to prosecute was the offence in respect of the complaint made to the Magistrate by the appellant on the 7th July as a result of which Police investigation was set in motion. The insertion of the 5th June, instead of 7th July, into the sanction to prosecute was a careless error of a kind which it is easy to make.

Mr. Triptipal Singh submitted, however, that having regard to the wording of section 139(1) of the Criminal Procedure Code, upon the face of the sanction itself, the Magistrate had no power to take cognisance of an offence alleged to have been committed on the 7th July. He contended that there was, in fact, no sanction before the Court upon which it could assume jurisdiction to entertain the charge against the appellant for an offence committed by him on the 7th July. In support of his argument he relied upon the case of *Hassan in Isahak* v. *Public Prosecutor.*[1] In that case a Court of three Judges, sitting under the provisions of section 306(3) of the Criminal Procedure Code upon an appeal reserved to them for hearing by a single Judge, held that in a prosecution for an offence under section 177 or 178 of the Penal Code the absence of the required sanction under section 139 of the Criminal Procedure Code deprived the Court of jurisdiction and any proceedings in such circumstances were a nullity. Section 448 of the Criminal Procedure Code provides that:—

"Subject to the provisions hereinbefore contained no finding, sentence or order passed or made by a Court of competent jurisdiction shall be reversed or altered on account of —

(a) any error, omission or irregularity in the complaint, summons, warrant, charge, judgment or other proceedings before or during trial or in any inquiry or other proceeding under this Code; or

(b) the want of any sanction required by section 139;

.....

.....

unless such error, omission, improper admission or rejection of evidence, irregularity, want or misdirection has occasioned a failure of justice."

That section is, of course, based upon section 537 of the Indian Code of Procedure. Section 139 of our Criminal Procedure Code is also based upon section 195 of the Indian Code of Criminal Procedure. In holding that the absence of the sanction rendered the proceedings a nullity the Court in *Hassan bin Isahak's case* referred to and relied upon, in particular, the Indian decision of *Muthu Moopan & Anor. v. Rex.*[2] A study of

that case, however, makes it clear that the decision of the Indian Court was substantially based upon the provisions of section 530 of the Indian Code of Criminal Procedure which provided that if any Magistrate "not being empowered by law in this behalf" tries an offender the proceedings shall be void. The Court there held that since under section 195 the Court had no jurisdiction to try the case in the absence of a sanction to prosecute, having regard to the express provisions of section 530 the Magistrate "not being empowered by law in this behalf" to try the case, the proceedings were void. There is no corresponding section to section 530 of the Indian Code in our Code. No reference was apparently made during the hearing of *Hassan bin Isahak's* appeal to the very much earlier case of *Salleh & Anor.* v. *Rex*,[3] which expressly decided, following earlier Indian decisions, that the want of a sanction does not vitiate a conviction, unless there is evidence that a failure of justice has been thereby occasioned. That decision, indeed, gives full effect to the express wording of the latter part of section 448 of the Criminal Procedure Code. Nor was any reference apparently made to the case of *Ng Chuan & Anor.* v. *Rex*.[4] In that case the accused had been convicted of an offence under the Tobacco Duties Ordinance. Upon appeal it was argued that the requisite sanction had not been obtained before the proceedings were heard. In allowing the appeal Murray-Aynsley C.J. said:—

> "Where a sanction is required to prosecute, the lack of it deprives the Court of jurisdiction. This cannot be cured unless there is statutory provision to that effect. Section 448 of the Criminal Procedure Code makes provision for want of sanction where such sanction is required by section 139 of that Code, but not otherwise".

Whilst I consider myself bound by the decision of the Court in *Hassan bin Isahak's case* I would with respect, take leave to doubt whether the Court was correct in expressly relying upon the Indian case of *Muthu Moopan*, having regard to the fact that that decision was itself based upon the express provisions of section 530 of the Indian Code which finds no counterpart in our Code.

However, I must proceed upon the basis that the absence of a sanction to prosecute for an offence under section 182 of the Criminal Procedure Code renders all subsequent proceedings before a Magistrate null and void despite the fact that the want of sanction did not occasion any miscarriage of justice. What, then, is the position where there has been a sanction to prosecute, but the sanction is defective by reason of some mistake in the particulars stated therein? After careful consideration I am clearly of the opinion that such a defect falls within the words "error, omission or irregularity" in the "other proceedings" before trial within the meaning of section 448(a) of the Criminal Procedure Code, and that it shall not vitiate the conviction unless it occasions a miscarriage of justice. As Hyndman-Jones C.J. pointed out in *Salleh's case*, the object of requiring a sanction to be given before prosecution is to ensure that prosecutions under these sections shall be instituted only after due consideration. In this case it was abundantly clear that the complaint made on the 7th July was, in fact, referable to the incident that took place on the 5th June. It is, therefore, apparent, *ex facie* that the wrong insertion of the date was an error curable under section 448. The fact that it was an error, and no more, was supported by the statement from the Bar of the then Deputy Public Prosecutor, Mr. Massie, and from the file produced by him, that he had applied his mind to the question of the prosecution of the appellant in respect of the complaint made by him to the Magistrate on the 7th July, and that he had sanctioned the prosecution of the appellant for an offence allegedly committed by him on that day under section 182 of the Penal Code. By inadvertence the date of the assault upon the appellant was inserted in the sanction instead of the date of the complaint made by the appellant to the Magistrate arising out of such assault. To set aside these proceedings and to hold them to be a nullity merely by reason of the incorrect date having been inserted by mistake in the sanction to prosecute, would make a farce of the administration of justice and hold it up to ridicule and contempt. I am satisfied that it was a defect curable under section 448(a) of the Criminal Procedure Code and that such defect certainly in no possible way occasioned any failure of justice. For these reasons I am satisfied that this appeal must be, and it accordingly is, dismissed.

Appeal dismissed.

Re ASIAN ORGANISATION LTD.

[C.A. (Tan Ah Tsh Ag. C.J., Chua and Ambrose JJ.) July 28, 1961]

[Singapore — Civil Appeal No. 8 of 1961]

Company Law — Application to rectify register of Members — Discretion of Court — Companies Ordinance (Cap. 174), s.101.

The appellants, members of the company, sought under section 101 of the Companies Ordinance to rectify the register of members. Their application was refused by the learned trial Judge. The main grounds of appeal were that: (1) there was no room for the exercise of discretion by the Court, (2) while the learned Judge had a discretion, it was a discretion to be exercised on legal grounds and that no sufficient legal grounds existed in this case, and (3) the learned trial Judge's attention was not drawn to the fact that the decision in *Bellerby* v. *Rowland & Marwood's Steamship Co. Ltd.*,[1] was reversed by the Court of Appeal.

Held: (1) there was a discretion in the Court below whether or not to order a rectification of the register of members;

(2) there were grounds upon which the learned trial Judge was able to exercise his discretion, and in this case the discretion was properly exercised;

(3) the reversal of the decision in the above said case does not affect the correctness of the principles